Supreme Court, U.S.
FILED
JUL 13 2006
OFFICE OF THE CLERK

No. 06-433

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

AUGUSTINE PEREZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDANT,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

AUGUSTINE PEREZ REG. NO. 19850-054
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PETITIONER, Pro-Se

QUESTIONS PRESENTED

1. Whether procedural rulings that ignored, inter alia, ***Kyles v. Whitley***, 514 U.S. 419 (1995), and ***Davis v. U.S.***, 417 U.S. 419 (1974), to preclude a merit determination of a ***Brady*** violation; and the failure to address and adjudicate the merits of a litany of other constitutional claims, without the judgment justifying the subterfuge, are sufficient for relief as inconsistent with due process of law for purposes of Fed.R.Civ.P.60(b) (4) and (6); ***Gonzalez v. Crosby***, 162 L.Ed.2d 480 (2005); ***Steward v. Martinez-Villarael***, 523 U.S. 637 (1998); ***Schwartz v. U.S.***, 976 F.2d 213 (4th cir.1992); ***U.S. v. Winestock***, 340 F.3d 200 (4th cir 2003)?

2. Whether the obliteration of facts and laws that conclusively show actual and legal innocence is a "defect in the integrity of the federal habeas proceedings" adequate to rectify under ***Gonzalez, supra***; ***U.S. v. Beggerly***, 524 U.S. 38 (1998); ***Schulp v. Delo***, 513 U.S. 298 (1995) and; ***Klapprott v. U.S.***, 335 U.S. 60 (1949), to correct a manifest injustice?

3. Whether a conclusory refusal of a certificate of appealability, (COA), can be merely because the "appellate court chooses to ignore in its opinion" the substantial showing of the denial of a series of constitutional rights; and the conclusive showing of actual innocence which should be worthy to proceed further, when it conflicts with the assessment mandated by ***Dye v. Hofbauer***, 163 L.Ed.2d 1,4 (2005); ***Miller-El v. Cockrell***, 537 U.S. 322 (2003); ***Reed v. Reed***, 404 U.S. 71 (1971) and; ***Reid v. Angelone***, 369 F.3d 363 (4th cir. 2004)?

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PETITION FOR A WRIT OF CERTIORARI

Augustine Perez respectfully petitions for a writ of certiorari to review the judgment entered by the court below.

OPINIONS BELOW

The district court's order and opinion denying Rule 60(b) relief is unpublished and is attached as A.1-3. The Court of Appeals' judgment and opinion is also unpublished and attached as A.4-6. The petition for rehearing and rehearing ***en banc*** was denied on May 16, 2006 and is attached as A.7.

JURISDICTION

The court below denied the petition for rehearing on May 16, 2006. This Court possesses jurisdiction under 28 USC § 1254(1).

CONSTITUTION, STATUTES AND RULES INVOLVED

The Fourth Amendment of the U.S. Constitution states, in part, that:

> "Unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause" ...

The Fifth Amendment of the U.S. Constitution states, in part, that:

> "No person shall be ... subject for the same offense to be twice put in jeopardy of life or limb ... nor deprived of life, liberty or property without due process of law"...

The Sixth Amendment of the U.S. Constitution states, in part, that: "In all criminal prosecution, the accused shall enjoy the right to a public trial, by an impartial jury ... and to have the assistance of counsel for his defence." [sic]

Title 28 USC § 2255, states, in part, that:

> "A prisoner in custody ... claiming the right to be released ... may move the court ... to vacate, set aside or correct the sentence"...

Title 28 USC § 2253(c)(2) states, in part, that:

> "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."

Federal Rules of Civil Procedure, Rule 60(b) states, in part, that:

> "On motion ... the court may relieve a party ... from the final judgment ... for the following reasons: ... (4) the judgment is void ... (6) any reason justifying relief from the operation of the judgment"...

STATEMENT OF THE CASE

On October 18, 1990, Perez filed, without counsel, a motion for a Temporary Restraining Order (TRO), and Preliminary Injunction to be heard in the civil forfeiture case involving assets needed to retain counsel of choice that were seized without a warrant and absent probable cause two (2) years before the criminal indictment. [A.8-9].

On December 4, 1990, the trial judge conceded that Perez has a due process right to be heard in the civil forfeiture case first. [A.10-15]. However, the next day, the trial judge granted the government's motion to stay the civil forfeiture case until the resolution of the criminal trial. [A.16-20].[1]

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1. Perez was made to appear without counsel despite that Joseph A. Sanzone was retained counsel of record, at that time, for the civil forfeiture case.

On December 10, 1990, the trial judge denied Perez's motion for TRO and Preliminary Injunction right before the commencement of the criminal trial.[2] On December 21, 1990, a jury found Perez guilty of Conspiracy, Continuing Criminal Enterprise (CCE), Possession with Intent to Distribute Cocaine, and Use of a Firearm During a Drug Offense. On March 15, 1991, Perez was sentenced to serve 326 months in prison. The judgment of convictions were affirmed on direct appeal. ***See, U.S. v. Hubbard,*** No. 91-5281 (4th cir.Aug. 27, 1993), (unpublished),[A.21-37]. On July 1, 1994, another panel reversed the district court's Summary Judgment Order entered in the civil forfeiture case. ***See, U.S. v. Perez & $15,716. in U.S. Currency,*** No. 92-2152 (4th cir.1994), (unpublished),[A.38-43].

On August 14, 1995 brief forfeiture hearing was held, without counsel Perez's assets were deemed forfeitable via fraud upon the court. ***See,*** [A.44-93, 94-126]. On March 19, 1997, Perez moved to disqualify the trial judge from adjudicating his motion under 28 USC § 2255.[A.127-181]. The judge refused to recuse himself[A.127]. Perez then gave his consent for a magistrate judge to adjudicate his § 2255 motion pursuant to 28 USC § 636(c)[A.239]. Perez requested to amend and supplement his § 2255 motion.[A.182-195].

The magistrate judge granted the request. [A.239]. However, on March 18, 1998, the trial judge denied the § 2255 motion without an evidentiary hearing.[A.214-232]. On April 9, 1998, the trial judge denied the "motion for reconsideration by another judge."[A.233].

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2. The appeal of the TRO & Injunction was dismissed as untimely and without prejudice as to the direct appeal on the criminal case. ***U.S. v. Perez,*** No. 91-8008, (4th cir. April 30, 1991).

On December 2, 1998, the Appeals Court denied the COA and dismissed the appeal.[A.234-236].[3] On August 3, 2005, Perez moved the district court to reopen its judgment, denying his § 2255 motion, for voidness and to rectify a manifest injustice under Fed.R.Civ.P. 60(b)(4) and (6). The district court chose to construe the petition as a successive § 2255 motion.[A.1-2]. The district court then misfiled the 60(b) motion under a new number, (i.e. 7:05-cv-488), [A.237], instead of under the § 2255 case number 97-CV-179-R.[A.238-240]. Perez complained repeatedly to the courts below that the district court's mishap resulted in the transmittal of an incomplete record on appeal.

Nevertheless, on February 22, 2006, without ordering the record of the § 2255 case, the Court of Appeals claimed to "have independently reviewed the record and conclude that Perez has not made the requisite showing."[A.6]. It then denied a COA and dismissed the Appeal. ***Id.*** The petition for rehearing was denied on May 16, 2006.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted and the judgment vacated because the lower courts' handling of the 60(b) motion was inconsistent with decisions by this Court, its own court, and other Courts of Appeals. The Judgments did not recognize nor adhere to , ***inter alia, Dye, Gonzalez, Steward, Beggerly, Klapprott, Winestock*** and ***Reid, supra.*** More importantly, this Honorable Court should make clear whether a "defect" that obscures a conclusive showing of actual innocence constitutes extraordinary circumstances to justify relief under Rule 60(b), and always worthy to proceed further with a COA to account, dispel or rectify the claim of actual innocence in the interest of justice.

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3. The court acknowledged later that requests for COA were denied improperly. ***See, Miller-El, supra.*** The denial did note that "the district court erred by denying certain of Perez's claims as untimely filed..."[A.235].

APPEAL COURT'S
JUDGMENT DENYING COA

The Court of Appeals claimed, without ordering the record of the § 2255 case, to "have independently reviewed the record and conclude that Perez has not made the requisite showing[]" to receive a COA.[A.6]. A COA is required whenever the "denial of Rule 60(b) relief was in error combined with a showing that the underly ıg habeas petition alleges a denial of a constitutional right." ***Reid,*** 369 F.3d at 371.

It is sufficient for Perez "to make the requisite showing with respect to any one of the claims in h[is] application."***Id.*** at 372; *accord* ***Gonzalez*** 162 L.2d at 495 n.7. Perez need not show that he will prevail on the merits, but only show that reasonable jurists would find that assessment of his constitutional claims and any dispositive ruling by the district court are debatable or wrong. ***Miller-El,*** 537 U.S. at 336. Here, the conclusory denial of a COA is defective when it was made with an incomplete record regarding the § 2255 case, because whether or not Perez made the requisite showing cannot be determined fairly without "[e]xamin[ing] the underlying habeas application." ***Reid supra, citing Morris v. Horn,*** 187 F.3d 333, 336 (3d cir.1999).

Also, this conclusory denial should not be allowed to survive when the Appellate Court chose "to ignore in its opinion ... [the requisite showing demonstrated] in petitioner's brief ..." ***Dye*** 163 L.Ed.2d at 4; ***quoting, Smith v. Digmon,*** 434 U.S. 332, 333 (1978). Otherwise, denying COA in such a manner can arbitrarily eschew meritorious claims with boilerplate and conclusory judgments that transgress due process of law.

THE DISTRICT COURT'S 60(b) ORDER

The district court treated the Rule 60(b) as a successive § 2255 motion because: (1) "Perez has failed to suggest any circumstances which would warrant relief"; (2) "Perez attempts to argue that this court misapplied the law in dismissing the matter" and (3); that Rule 60(b) "is not to rehash those issues which have already been addressed in an earlier ruling." [A.1-2].

However, the Rule 60(b) motion illustrated that: (A) erroneous procedural rulings were made to impede a merit determination; (B) the merits of constitutional claims were not addressed or adjudicated without any justification for the evasion and; (C) the facts showing actual and legal innocence were obliterated from the claims the judgment skimmed. First, this court held that Rule 60(b) may be used to rectify "some defect in the integrity of the federal habeas proceedings and or when "a previous ruling which precluded a merit determination was in error ..." ***Gonzalez,*** 162 L.Ed.2d. at 493 & n.4.

This rule also allows the courts to modify its "judgment for error of facts or law" in cases of injustices to "demand a departure from ... the doctrine of ***res judicata***." ***Beggerly*** 524 U.S. at 43. ***See Winestock, supra,*** at 207, ("a motion seeking a remedy for some defect in the collateral review process will ... be deemed a proper motion to reconsider" under Rule 60(b)). Such a claim, "can therefore be ruled upon by the District Court without precertification by the Court of Appeals ..." ***Gonzalez*** at 496.

When the motion contains mixed claims, that applicant "must be given 'an opportunity to elect between deleting the improper claims or having the entire motion treated as a successive application." ***Reid*** at 375; ***quoting Winestock*** at 207.

These principles were not even acknowledged by the District Court or the Court of Appeals. The courts "have always required a departure from precedent to be supported by 'some special justification.'" ***U.S. v. International Bus. Mach. Corp.,*** 517 U.S. 843,856 (1996).

Second, the misapplying of law. The failure to adhere to precedent in effect at the time of the ruling, and ignoring whole claims without reasons, merely to preclude a merit determination, clearly violates due process and equal protection rights. ***Reid supra. See also e.g., Agostini v. Felton,*** 521 U.S. 203, 238 (1977), (order cannot stand when "it rests upon" an error of law); ***Compton v. Alton,*** 608 F.2d 96, 106 (4th cir.1979),(a judgment involving a "plain mistake of law" is void for lack of due process); ***Schwartz,*** 976 F.2d at 217, (judgment is void, under Rule 60(b)(4), when it is rendered "in a manner inconsistent with due process of law").

Third, the courts below erred when they did not afford Perez an opportunity to delete any claim they felt was improper for 60(b) relief before treating it as a successive § 2255 motion. ***See, Winestock*** and ***Reid supra.*** Also, "[t]he ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." ***American Canoe Ass'n v. Murphy Farms Inc.,*** 326 F.3d 505,515 (4th cir.2003). "Though that obligation may be tempered at times by concerns of finality and judicial economy, nowhere is it greater and more unflagging than in ..." cases of injustices." ***Id.*** An impediment around a conclusive showing of actual innocence, surely establish extraordinary circumstances to justify relief. ***See, Klapprott, Schlup*** and ***Beggerly, supra.***

Therefore, the claim that Perez failed to suggest any circumstances which would warrant relief is clearly wrong in fact and law, and both the collateral defect and underlying

habeas claims demonstrates the denial of constitutional rights that have already been resolved differently by reasonable jurists.

THE 1998 JUDGMENT DENYING THE § 2255 MOTION

The collateral review process was limited in scope and procedure which was aggravated further when meaningful appellate review was also impeded erroneously with a conclusory denial of a COA pre-***Miller-El, supra.*** Therefore, this judgment is irregular and inadequate because:

I

The procedural ruling on the ***Brady*** violation is defective, because it ignored the authority that required adjudicating the merit under the intervening definition of materiality and cumulative misconduct analysis as enunciated in ***Kyles v. Whitely***, 514 U.S. 419 (1995). ***See,*** [A.130, 145-146]. The judgment ignored ***Kyles*** and ***Davis v. U.S.,*** 417 U.S. (1974), and therefore refused to adjudicate the merits of this "claim because it was litigated on direct appeal." [A.221].[4]

However, ***res judicata*** or the law of the case doctrine are not appropriate when there has been an intervening decision applicable to the issue. ***See, Davis, supra; Sejman v. Warner-Lambert,*** 845 F.2d 66,69 (4th cir.1988); ***U.S. v. Aramony,*** 166 F.3d 655,661 (4th cir.1999); [A.204-205]. However, ***res judicata,*** or the law doctrine, are not appropriate when there has been an intervening decision applicable to the issue. ***See, Davis, supra; Sejman v. Warner-Lambert,*** 845 F.2d 66, 69 (4th cir.1988);

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4. Eleven (11) months after oral arguments, the direct appeal did not discuss the facts giving rise to the ***Brady*** violation. It was discarded in a conclusory manner, (in a footnote), along with many other serious claims. ***See,*** [A.24-25, n.6 & 26]. Nevertheless, the direct appeal did not have the benefit of ***Kyles, supra.***

U.S. v. Aramony, 166 F.3d 655, 661 (4th cir.1999);[A.204-205]. This defect did not result from a mis-conception, of somekind, that was realized after precluding a merit determination of a habeas claim. Instead, it derived from a flagrant disregard of precedent that was settled long before the habeas petition was filed. As such, the judgment's failure to recognize and adhere to precedent in effect at the time of the ruling, merely to avoid resolving a meritorious claim, is clearly inconsistent with due process and violates the Equal Protection Clause. ***Reid*** and ***Schwartz supra***.

The remedy for this defect is a full and fair adjudication of the ***Brady*** violation, under the ***Kyles'*** analysis as presented in the § 2255 motion. [A.145-146]. Reasonable jurists have already deemed less compelling circumstances a proper 60(b) motion. ***Gonzalez supra. See also, In re Abdur' Rahman,*** 392 F.3d 174 (6th cir.2004), (erroneous procedural ruling that avoided the merits of prosecutorial misconduct claim required relief under Rule 60(b). Also, whenever the "prisoner can show that there is probable merits to his underlying claims, it would be well ... under Rule 60(b) ... to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have." ***Gonzalez*** at 499, (Steven J. dissenting).

Here, the ***Brady*** claim is debatable under ***Kyles'*** analysis when James Garrison testified, at the misconduct hearing on May 20, 1992, that he lied to agents and the Grand Jury merely to get out of prison. He exaggerated drug quantity and suggested the amount involved was two (2) kilograms of cocaine. ***See,*** [A.241-249]. The prosecutor conceded that Garrison's suppressed testimony is material enough that he "would have had to tell them, and I would have told them. The fact is that no one in the United States Government knew that." [A. 252-253].

However, Garrison admitted under oath, four months before Perez's trial, and before the same prosecutor and judge, that he had lied in his prior statements. [A. 255-256]. When faced with this fact, the prosecutor claimed that "[a] statement that a defendant makes to the court during an open hearing in his own sentencing is not a statement within the possession of the United States...."[A. 257].

The prosecutor branded Garrison a "liar" who "lied and lied and lied" and is "absolutely incredible" as his reason for not calling him as a witness.[5] [A. 250-251, 254]. This court subsequently explained that "the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." ***Kyles*** 131 L.Ed.2d. at 508. It also stressed that the ***Bagley*** materiality ... is not a sufficiency of the evidence test." ***Id***. at 506.

"[O]nce there has been a ***Bagley*** error as claimed in this case, it can not be subsequently found harmless under ***Brecht." Id.*** at 507. It further noted that the misconduct is to be "considered collectively, not item-by-item." ***Id.*** The suppressed evidence is **material** not only to guilt on the CCE, but it also contradicted Gary Anderson's trial testimony, which was impeached because all his prior statements were that the conspiracy involved a total of two (2) kilograms of cocaine. Before the jury, is suddenly became 8 to 10 kilograms of cocaine. ***See,***[A.26, 146]. The ***Brady*** violation is not only debatable but meritorious under ***Kyles'*** analysis because the prosecutor conceded that the evidence suppressed is **material**.

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5. Yet, the same prosecutor, before the same judge, turned right around and used Garrison's admitted lie, via hearsay, to establish probable cause anew to justify the seizure and forfeiture of Perez's money at the 1995 civil forfeiture hearing. ***See***, [A.98-114, 249].

However, he claimed, contrary to the record, that he was unaware of it. ***See e.g., U.S. v. Coffie***, 80 F.3d 514 (D.C. cir.1996), (key witness who lied in previous court proceeding is "material" for ***Brady*** purposes); ***See, Jean v. Rice***, 945 F.2d 82 (4th cir.1991). Accordingly, a COA should not be denied simply because it chose to ignore the egregious procedural ruling on a meritorious constitutional violation.

II

The judgment is literally void because it completely neglected to address and adjudicate the merits of five (5) out of eleven (11) additional incidents of prosecutorial misconduct presented under the ineffective assistance of counsel claim. ***See, U.S. v. Young,*** 470 U.S. (1988); ***Darden v. Wainwright*** 477 U.S. 168 (1986).

Specifically, Perez's § 2255 sought relief from the fact that the prosecutor, ***inter alia,*** improperly argued that: (1) Gary Anderson's immunity remains intact because the government did not "catch him in a lie"; (2) Perez's income was only $12,000 when the pay-stubs admitted into evidence showed it was $24-$28,000; (3) Perez was not recorded on Anderson's wiretap, when the notice admitted in evidence said that he was recorded on that wiretap but, the recording was also suppressed by the government officials; (4) elicited perjured and irrelevant inflammatory testimony to depict Perez before the jury as a violent reprehensible husband and father and (5); borrowed a gun from ACE's hardware store to brandish to the jury. ***See,*** [A. 141, 146-147, 166, 179-181]; [A. 283-308].

The judgment ignored these claims without justification. ***See,*** [A.221-222]. Perez is "entitled to an adjudication of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." ***Steward*** 523 U.S. at 643. ***Accord Gonzalez,*** 162 L.Ed.2d at 493 n.6; ***Winestock, supra.***

Therefore, Perez is entitled to have these claims resolved on the merits, without pre-certification by the Court of Appeals, under the analysis that requires that all of the misconduct and errors, including those glossed over, be "considered collectively" to determine whether their combined effect infected the fairness of the trial. ***Kyles, supra. See also, U.S. v. Adam,*** 70 F.3d 776, 780 (4th cir.1995).

These claims are debatable among reasonable jurists when "much ... [of the] incriminating evidence came from one source, Gary Anderson." [A.35]. He was the only witness who suspiciously tied every defendant on trial to the conspiracy alleged via unsubstantiated hearsay. [A.34 n.19]. ***See also,*** A.309-333. A case is defined as "legally close" when it turns on the credibility of a single fact witness. ***U.S. v. McBride,*** 862 F.2d 1316, 1319-20 (8th cir.1988).

Vouching for Anderson's truthfulness was therefore extremely prejudicial because the government's case hinged mostly on his credibility. ***See e.g., U.S. v. Frances,*** 170 F.3d 546, 550-551 (6th cir.1999), (claim that witness is credible because untrue testimony would jeopordize their plea agreement was reversible error). ***See also, U.S. v. Loayza,*** 107 F.3d 257, 261 (4th cir.1997); ***U.S. v. Manning,*** 23 F.3d 570, 572 (1st cir.1994); ***U.S. v. Eyster,*** 948 F.2d 1196 (11th cir.1991), (cases reversed because of improper vouching). Relief may also be required when the prosecutor argued facts not supported by the record. **See,** ***U.S. v. Mitchel,*** 1 F.3d 235, 240-41(4th cir.1993); ***U.S. v. Forloma,*** 94 F.3d 91 (2d cir.1996); ***U.S. v. Wilson,*** 135 F.3d 291, 297 (4th cir.1998); ***U.S. v. Golding,*** 168 F.3d 700 (4th cir.1999); ***U.S. v. Watson,*** 171 F.3d 695, 698 (D.C. cir.1999), (cases reversed because the prosecutor argued **ONE FACT** not supported by the record). Here, the prosecutor wittingly argued numerous facts contrary to the record to cure the flaws fatal to its case,

improperly vouched for his key witness, committed a ***Brady*** violation, presented perjured testimony and, improperly inflamed the jury to convict Perez. Inflammatory arguments only distract the jury from deciding if the evidence presented establish guilt beyond a reasonable doubt. ***Arrieta-Agressot v. U.S.,*** 3 F.3d 525, 529-30 (1st cir.1993). The direct appeal deemed that the jury in this case was unable to apply "a reasoned process of inferring from trial evidence the requisite elements of conspiracy."[A.33].

Thus, it will not be a futile gesture to reopen the collateral judgment to adjudicate the merit of the misconduct that received relief, separately, in other cases. Surely, relief is warranted when viewed under the proper analysis which requires that all of the misconduct be considered collectively. Therefore, the denial of a COA should not be permitted to survive when the court below simply chose to ignore the indisputable showing of the denial of several constitutional rights. ***Dye, Miller-El,*** and ***Reed, supra.***

III

The judgment violated due process when it obliterated the facts and law that conclusively show actual innocence and the courts have the responsibility to reach the correct judgment under the law to rectify a manifest injustice. ***See, Beggerly, Schlup, Klapprott, Amercian Canoe,*** and ***Schwartz, supra.*** The law of the case doctrine is also not applicable when the first decision was clearly erroneous and enforcement of its command would work a substantial injustice. ***Arizona v. California***, 460 U.S. 605, 618 n.8 (1983); ***Sejman*** and ***Aramony, supra.*** Here, the § 2255 proceedings deprived Perez the benefit of precedent on the recantation of material test only. It also ignored the fact that the direct appeal affirmed convictions solely with testimony that was subsequently recanted as perjured testimony. ***See***, [A.26-27, 143-144 & 179-181].[6]

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6. The government did not resond to this claim at all. ***See***, [A.196-200]...

Instead, the judgment made the bald claim that "even excluding Anita Perez's testimony, there was more than sufficient evidence to convince a reasonable jury that Perez committed the offense with which he had been charged."[A.219].

However, Count Eight charged Perez, Tejada-Reynosos and Anita with Possession With Intent To Distribute "approximately four kilograms of ... cocaine ... on each of four occasions. That... these shipments of cocaine... were hidden, in... a public elementary school." All in violation of 21 USC §§ 841(b)(1)(a) and 845(a). Indictment.

The direct appeal affirmed this Count because "the government's other key witness, Anita Perez... testified that Augustine came to the school where she worked... and stored something in the janitor's closet *** This evidence is sufficient to uphold Augustine's conviction under 21 USC § 845(a)." [A.26-27 n.10]. She was the only witness whom falsely claimed to have "traveled to New York on various occasions to pick up cocaine and bring it back to Lynchburg for distribution."[A.26]. Thus, the other counts all depend upon the imaginary 16 kilograms of cocaine admittedly fabricated by Anita from which Gary Anderson alledged to have received 8 to 10 kilograms for complete immunity.[7]

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6. ***(Continued)*** ...Troubling, no evidentiary hearing was conducted on the recantation of material testimony. See also, [A.26, n.9]. The § 2255 also established the claim that the trial judge was biased which is why Perez moved, unsuccessfully, to disqualify him from adjudicating his § 2255 motion. ***See,*** [A.167-170].

7. Gary's favorite numbers seem to be 8 to 10 kilos – 8 to 10 guns. It is also worthy to note that Frances Anderson, Gary's wife, testified that her husband used and sold cocaine long before they even met Perez. [Tr. 184-191, 12/13/90]. Tamara Hamlett testified that she witnessed Gary supply Perez with cocaine. [Tr. 132-135, 12/14/90]. ***See also***, [A. 26, n. 7-9].

[A.26-27 n.8, 179-180]. The jury's verdict is limited to 15 kilos of cocaine based on this false testimony. [Dkt. No. 90-cr-112, p.8-9]. The proper focus should have been on what actually happened as a result of the perjured testimony, not what might happen in a subsequent proceeding. "Only the jury can determine what it would do on a different body of evidence." ***Mesarosh v. U.S.***, 352 U.S. 1, 12 (1956).

Therefore, "(t)he district court was not the proper agency to determine whether there was sufficient evidence at trial, other than that given by the witness in question, to sustain the convictons." ***Mesarosh*** 352 U.S. at 1. Especially, after the perjured testimony was the only proof relied on to sustain the conviction on direct appeal. "(O)ne should not be convicted on false testimony" and a credible recantation of material testimony requires vacating the conviction. ***Sanders v. Sullivan***, 900 F.2d 601, 606 (2d cir.1990).

Moreover, the judgment not only conflicts with the decision on direct appeal, but it is also conclusory and internally contradictory. These defects were never addressed because the collateral review process was limited in the scope and procedure, which denied Perez his right to "a full hearing and adjudicatin of his ... claim." ***Cradle v. U.S.***, 290 F.3d 536,538 (3d cir.2003). For example, how can the recantation of material testimony be deemed useless, considering the preceding facts, and yet, "remain very damaging," when all her damaging testimony was recanted? Noticeably, the judgment did not specify what damaging testimony remains after the recantation. ***See***, [A.219, 221].

Accordingly, Perez has a due process right to know exactly what evidence is sustaining his convictions after the testimony relied on exclusively to affirm, ***inter alia***, Count Eight was subsequently recanted as perjured testimony.

Conclusory and contradictory claim that her testimony "remains very damaging" is clearly inadequate and unacceptable, when it is clearly negated by the record and, substantial liberty interest is at stake.

The judgment's defect perpetrated a manifest injustice. This showing is worthy to proceed further when "[a]nother court ... resolve[d] the issue differently." ***Miller-El***, supra. See also, ***U.S.. v. Ramsey***, 726 F.2d 601 (10th cir. 1988), (relief granted after key witness recanted material testimony); ***U.S. v. Young***, 17 F.3d 1201 (9th cir. 1994), (false testimony required relief); ***U.S. v. Vaziri***, 164 F.3d 556 (10the cir. 1999), (perjured testimony effected jury's judgment); ***Gonzalez v. Lytle***, 167 F.3d 1318, 1321 (10th cir. 1999), (habeas petition granted for "excluding her recantation"); ***In re Williams***, 330 F.3d 277, 283 (4th cir. 2003), (due process violated when witness recanted perjured testimony); ***Ortega v. Duncan***, 333 F.3d 102 (2d cir. 2003), (habeas petition granted because of the recantation of material testimony); ***Bragan v. Morgan***, 791 F.supp 704 (M.D. Tenn. 1995), (false and misleading testimony required relief); ***U.S. v. Chandler***, 950 F.supp. 1522 (N.D. ala. 1997), (recanted testimony required an evidentiary hearing).

Hence, the judgment's obliteration of facts and law that conclusively show actual innocence establish a "defect in the integrity of the federal habeas proceeding", which can and should be rectified under rule 60(b) to accommodate "doing justice in the extraordinary case" showing actual innocence. ***Gonzalez, Beggerly, Schlup*** and ***Klaprott, supra***.

IV

The judgment is void because it applied an unconstitutional principle of law in violation of due process and Equal Protection Clause, which impeded the relief required from the facts showing actual and legal innocence of the § 924(c) conviction.

The judgment did not address nor adjudicate the fact that only one theory was presented in this case, which was affirmed on direct appeal, but subsequently turned out to be insufficient to sustain this conviction. ***See***, [A. 140-142]; ***Bailey v. U.S.***, 516 U.S. 137 (1955); ***Bousley v. U.S.***, 523 U.S. 614, 619-23 (1988); ***Gonzalez***, at 495 n.9.

Specifically, the judgment erroneously supplemented the jury's verdict, and the affirmance on direct appeal, from use to the contested element of carrying a firearm in relation to a drug offense. It held that the conclusive evidence "of 'constructive possession' [of Calloway's guns in the closet of Perez's house] does not establish any likelihood that the jury relied only on this testimony to find Perez guilty under § 924(c). Therefore, the court concluded that Perez had failed to show 'actual prejudice' stemming from the erroneous instructions as to the 'use' element at his trial." [A. 219].

However, the prosecutor told the jury that: "[h]e's not accused of carrying guns [or] ...owning guns ... He's charged with possessing a gun." [A. 272-273]. "[T]he jury found Augustine Perez guilty of ... possessing a firearm during a drug trafficking offense .. [and the direct appeal affirmed this theory because] *** the jury could easily infer that Augustine possessed a firearm while conducting a drug transaction ...." [A.26,28]. This court subsequently held that passive possession of a firearm near drugs, alone, is insufficient to satisfy the "use" prong of § 924(c). ***Bailey, supra.*** A judge may not enter a direct verdict of guilt no matter how conclusive the evidence. ***U.S. v. Hogue***, 132 F.3d 1087, 1089 (5th cir. 1998). Yet, this is precisely what the collateral judgment managed to accomplish despite the law that a court "cannot constitutionally supplement the jury's verdict from use to carrying a firearm in relation to a drug offense. ***See, Pope v. Illinois***, 481 U.S. 497, 509 (1987).

Especially, "where the defendant contested the [carry] element and raised evidence sufficient to support a contrary finding." ***Neder v. U.S.*** 144 L.Ed.2d 35, 53 (1999). Perez adamantly contested that he carried a gun "in relation" to a drug offense sufficient to cause the prosececutor to abandon the carry prong at trial.

Moreover, a court may not sustain a "conviction on legal or factual grounds that were never submitted to the jury." ***McCormick v. U.S.***, 500 U.S. 257, 269 (1991); ***U.S. v. Winefield***, 997 F.2d 1076, 1081 (4th cir. 1993). It is also improper to assume which theory the jury relied on when one of the theories is later found insufficient, "and it is impossible to tell which ground the jury selected." ***Yates v. U.S.***, 354 U.S. 298 (1957). ***See***, ***Griffin v. U.S.***, 501 U.S. 46 (1991); ***U.S. v. Behler***, 100 F.3d 632, 639 (8th cir. 1996); ***U.S. v. Hasting***, 134 F.3d 235, 238 (4th cir. 1997). The prosecutor in this case settled for one ground that was later held to be insufficient to support the § 924(c) conviction. This scenario should have automatically required vacatur as a mater of law. Further, the judgment's factual claim respecting carrying a gun is inadequate because the record show that Perez is also innocent of carrying a firearm "in relation to" a drug offense.[8] ***See***, [A. 218]. Perez was stopped and searched several times and he did not have a weapon. ***See***, [A. 258-262]. Anita made it clear that the time she claimed to see Perez carry a gun was not related to any drug offense. ***See***, [A 263]. Calloway too noted that the occasions Perez allegedly carried a gun were not related to any drug offense. He also admitted that the guns seen at Perez's house were his. ***See***, [A. 264-269].

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8. Gary Anderson is the only witness whom claimed before the Grand Jury that Perez "always carried 8 to 10 guns." However, at trial, he explained; "that means when I go to the house I see eight (8) guns." [Tr. 147-148, 12/11/90].

Rush claimed that Perez heard a noise and he took a gun outside to investigate. [A. 270-271].[9] This theme is consistent with all the other witnesses which is why the prosecutor abandoned the carry element at trial.

Therefore, even if, arguendo, the contested element of carrying a gun was true, all the witnesses testified that it was not related to any drug offense. For the "in relation to" requirement of § 924(c), "[t]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincident. "***Smith v. U.S.***, 508 U.S. 223, 237-238 (1993). ***See also***, ***U.S. v. Martinez***, 44 F.3d 148 (2d cir. 1994), (sharing drugs while possessing a gun is insufficient to support a § 924 (c) conviction); [A, 272-273]; ***U.S. v. McPhail***, 112 F.3d 199-200 (5th cir. 1997) (no evidence that McPhail carried a gun "while on drug related business"); ***U.S. v. Wilson***, 115 F3d 1185- 1191-92 (4th cir. 1997), (same). Thus, the collateral proceedings violated Perez's due process right to have a jury, rather than judge, determine beyond a reasonable doubt whether or not he carried a firearm in relation to a drug offense. ***See,, U.S. v. Gaudin***, 515 U.S. 506, 522-23 (1955). The arbitrary departure from precedent was also exacerbated by the fact that the judgment was never subjected to a meaningful review on appeal.***See,*** A.234-236; ***Dye*** and ***Miller-El***, ***supra***. Finality in litigation has no place where substantial rights and liberty interest are deprived merely because of "some defect in the integrity of the federal habeas proceedings." ***Gonzalez, supra***.The Courts should be eager to correct errors of "facts and law" to accommodate doing justice in the extraordinary case showing actual innocence. ***See***, ***Beggerly, Schlup, Arizona, Klapprott, American Canoe*** and, ***Aramony***.

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9. The government relied on this alleged incident to oppose relief under ***Bailey*** during the § 2255 proceedings. ***See,*** [A.198].

V

The judgment is literally void because it precluded a merit determination on a Fourth Amendment violation without providing any justification for the complete failure to address and adjudicate this constitutional claim. ***See***, A. 148-150 & 214-232. This defect deprived the right "to seek relief through § 2255" on the warrantless seizure of diskettes shown unreliable with obvious bogus entries that could have been created by anyone of five people, including government officials. [A. 148-150]. Due process requires an adjudication, on the merits of all the claims presented in a habeas petition. ***See***, ***Gonzalez***, ***Steward***, ***Winestock***, and ***Schwartz, supra***.

This claim is more than debatable when, after the hearing, ***inter alia,*** the motion to suppress, computer diskettes were kept under advisement until the middle of the trial. The diskettes were then allowed into evidence under the "good faith exception" of ***U.S. v. Leon***, 468 U.S. 897 (1984). ***See***, Dkt 90-cr-112, p. 4, 12/04/90. However, the good faith exception is clearly not applicable to warrantless seizures. ***See***, ***U.S. v. Moss***, 963 F.2d 673, 680 (4th cir.1992). This constitutional violation should not have been ignored merely because it required relief.[10] Moreover, the data entries are clearly unreliable as the real evidence showed that Perez never owned none of the assets listed on the disk. It had entries dated 1940, 1988, 1989 and 1990. "A date yet to come." [Tr. 29,31-32,71, & 74-75, 12/12/90].

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10. The direct appeal declined to adjudicate the merits of this claim, but still relied on this questionable evidence. [A. 27 n. 11]. The conclusory claim of overwhelming evidence is contradicted by the record, the tiral judge and the prosecutor. The conspiracy was deemed complex and difficult to prove because of the innocent relationship between the defendants aside any conspiracy. [A. 34-35]. The trial judge said that he 'would have found Mr. Perez **not guilty**." [Tr. 2, 17 2/26/91]; and a News Articil quoted the prosecutor saying that, "There was no smoking gun..." [A. 276].

Jessie Calloway is the only person on the disk whom also admitted to drug dealings with Garrison and Anderson. [Tr. 95,108-110,119, 12/13/90]. Garrison and Anderson are among whom either possessed or had access to computer and disk before and after Perez started serving his state sentence. [Tr. 352, 357-58, 12/11/1990; 211-12, 12/13/90; 124, 12/19/90].

Nevertheless, the disk was used to bolster hearsay on the fictitious balance somewhere for $300,000 and, to corroborate Calloway's account, which was his dealings with Garrison.[11] The phantom property and cash on the disk is the only evidence of substantial income the jury, the direct appeal, had to consider to find the elements for the CCE. ***Brect v. Abrahamson***, 507 U.S. 619,637 (1993). The appeal that followed the § 2255 motion is disturbing.

It affirmed this claim, and others, with reference to "reasoning" that do not exist in the district court's judgment, which over-looked this claim completely. ***See,*** [A.235]. This defect did not arise from a susequent development of law, but from a defect in the integrity of the collateral review process. Accordingly, due process requires adjudication of this claim without precertification by the Court of Appeals. ***See***, ***Rose v. Lundy***, 455 U.S. 509, 520 (1982), ("providing for a more focused and thorough review" of habeas petitions); ***Clisby v. Jones***, 960 F.2d 925, 935-36 (11th cir. 1992), citing cases that were remanded for "consideration of issues the district court chose not to resolve...regardless whether habeas relief is granted or denied"). ***Accord***, ***Dye, supra***.

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11. Garrison pleased guilty to the charge of conducting a continuing Criminger Enterprise, (CCE).

VI

The judgment did not address the clam that Perez would have prevailed in the civil forfeiture case had he been given an opportunity to be heard before instead of five (5) years after the criminal trial. ***See***, [A. 155-159, 223]. The denial of the right to be heard at a meaningful time and in a meaningful manner, on assets needed to retain counsel of choice, in combination, is a structural error that vitiated all the related proceedings that followed.

The direct appeal diminished the violations around the illegal seizure and forfeiture of assets needed to retain counsel to the conclusory reference to the "Fourth, Fifth, Sixth and Fourteenth Amendments...[as] meritless." [A. 24-25 n.6]. But see, [A. 38-43], antoher panel reversed the summary judgment order entered in the civil forfeiture case); [12] ***U.S. v. Farmer***, 274 F.3d 800 (4th cir. 2001), (held that due process requires a pre-trial adversary hearing on assets needed to retain counsel of choice). "First, I am curious as to who will represent the defendant at this hearing."

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12. This opinion, with those issued before and after, neglect the claim that the law requires the return of property seized without a warrant and absent probable cause. ***See***, [A. 41]]; ***Plymouth Sedan v. Penn.***, 380 U.S. 693 (1965); ***Riverside v. McLaughlin***, 500 U.S. 44, 55-56 (1991); ***Florida v. White***, 143 L.Ed. 2d. 748, 751-53 (1999); ***U.S. v. Kemp***, 690 F.2d 397, 401 (4th cir. 1982)l ***U.S. v. McCraw***, 920 F.2d 224, 227 (4th cir. 1990); ***U.S. v. $31, 990***, 982 F.2d 851, 856 (2d cir. 1993); ***U.S. v. All Funds On Deposit***, 8113 F. Supp. 180, 187 (E.D.N.Y. 1993).

This subterfuge was also used to circumvent the claim that the law prevents reliance on hearsay to establish probable cause when its veraity and reliability are not corroboratd or investigated. ***See***, ***U.S. v. Ventresca***, 380 U.S. 102-03 (1961); ***Franks v. Delaware***, 438 U.S. 154, 168 (1978); ***Illionoise v. Gates***, 462 U.S. 213 (1984); ***U.S. v. Lalor***, 996 F.2d 1578-1581 (4th cir. 1993)); ***U.S. v. Sinclair***, 983 F.2d 598 (4th cir. 1993); ***U.S. v. Wilhelm***, 80 F.3d 116 (4th cir. 1996); ***U.S. v. Wells***, 223 F.3d 835 (8th cir. 2000).

U.S. v. Monsanto IV, 924 F.2d 1186, 1203 n.1 (2d cir. 1991), (en banc), (Oakes Chief Judge, with whom Winter, Miner, Altamari and Walker Circuit judges join concurring in part and dissenting in part). ***See also***, [A. 176-177, ¶¶ 6-10]. The judge did not … appoint counsel so Perez was presented to the 1995 forfeiture hearing without a lawyer.

The synopsis in the case sub judice is synonymous to the complete denial of counsel during critical stages of the proceedings because, unlike any other case, Peez was forced, ab initio, to assert his basic fundamental rights without the assistance of counsel. ***See***, [A. 10-20]. The unwarranted deprivation of the constitutional rights involved created the pre-disposition not to return the assets in any proceeding that followed because of the subsequent effect it would have on the criminal conviction.

Consequently, the record conclusively shows that probable cause to seize and forfeit the res in actually absent. It is in disputably absent at the time of the warrantless seizure in 1988. ***See***, [A. 41]. On remand of the civil forfeiture case, Perez adduced the transcripts which confirmed that the "possibly reliable" hearsay, against AJ's clothing store, was advanced in total disregard of the truth in violation of ***Franks supra***. ***See***, [A. 44-93]. The warrant affidavit in rem also omitted the fact that an informant was sent into AJ's. [A. 44].

Subsequently, the same prosecutor, before the same judge, turned right around and knowingly used Garrison's admitted lie, via hearsay, presented for the first time at the 1995 forfeiture hearing, to establish probably cause anew fo the seizure and forfeiture of innocent assets. ***See***, [A. 94-114, 249-251]. The following judgments just ignored the ***Franks*** violation because it reqired the removal of the false hearsay from the warrant affidavit ***in rem***.

This falsity was the only ground deemed to have established probable cause to institute forfeiture proceedings in 1990. ***See***, [A. 41, 43]. The fraud perpetrated to forfeit the ***res*** at the 1995 forfeiture hearing was never addressed. The government's conflicting positions regarding Garrison's credibility was not adjudicated.[13]

They also did not address that the new hearsay is not only shown to be false, but it was fabricated four months after the forfeiture complaint was filed and thus, created too late for purposes of probably cause.[14] ***See,*** [A.115-126]. In other words, no judgment in the civil forfeiture, criminal and collateral proceedings ever addressed or adjudicated the fact that probable cause is absent at the time of warrantless sezure in 1988. When the forfeiture complaint was filed in 1990 and, at the forfeiture hearing in 1995, where the same prosecutor knowingly used an admitted lie, via hearsay, via hearsay, to re-established probably cause for the seizure and forfeiture of untainted assets. Perez had retained counsel for the civil forfeiture case since the illegal seizure of the ***res*** in 1988.

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13. Judicial estoppel suppose to prevent a party from taking conflicting positions. ***See***, ***Davis v. Waklee***, 156 U.S. 680 (1895); ***Lowery v. Stoval***, 92 F.3d 219, 233 (4th cir.1996).

14. The government must first show that the hearsay is reliable before the burden shifts to the claimant. ***U.S. v. Thomas***, 913 F.2d 1111, 1114 (4th cir.1990). Also, only information brought to the magistrates's attention may be considered to find probably cause. ***Maryland v. Garrison***, 480 U.S. 75, 85 (1985). ***See also***, ***U.S. v. $91,960***, 897 F.2d 1457, 1462 (8th cir.1990); ***U.S. v. Parcel of Property***, 9 F.3d 100-03 (1st cir. 1993); ***U.S. v. $191,910***,16 F.3d 1070-71 (9th cir. 1994)); ***U.S. v. $36,634***, 103 F.3d 1048 (1st cir.1997); ***U.S. v. $405,089.23***, 122 F.3d 1285, 1289(9th cir.1997), (cases holding that evidence obtained after the forfeiture complaint is filed may not be considered for probable cause). ***Accord Riverside*** 500 U.S. at 56 (delay for purposes of gathering evidence to justify the seizure is unconstitutional), The purpose behind precedent is to bind cases of the same nature. ***Anastasoff v. U.S.***, 223 F. 3d 898, 904 (8th cir.2002).

However, by the time the truncated forfeiture hearing was held in 1995, Perez had been confined six (6) years and no longer had counsel. He also showed that he lost witnesses because of the government's delay. ***See***, [Dkt. 90-cr-112, p. 8-9], (subpoenas returned unexecuted). A fact that was repeatedly ignored.

Therefore, Perez would have prevailed had he been heard before instead of five (5) years after the criminal trial.[15] In fact, he would have even prevailed after the criminal trial absent the departure from precedent and Equal Protection Clause. This effect is obviously from the due process and Sixth Amendment violations to be hard on assets needed to retain counsel of choice. ***See, U.S. v. Monsanto***, 491 U.S. 600, 618 n.10 (1989). While the prejudice suffered is abundant and evident, Perez should not have to demonstrate it on a structural defect. The denial of the right to self representation at trial is a structural error. ***See***, ***MaKaskle v. Wiggins***, 465 U.S. 168, 177-78 n.8 (1984).

Like the denial of the right to self-representation, the unwarranted denial of the right to counsel of choice can "never be harmless." Both rights "reflect [] constitutional protection of the defendant's free choice independant of concern for the objective fairness of the proceedings." Flanagan v. U.S., 465 U.S. 259, 268 (1984). ***See also***, ***U.S. v. Gonzalez-Lopez***, 399 F.3d 924 (8th cir. 2005), (denial of right to counsel of choice is "structural" error not subject to harmless error analysis), (Cert. granted No. 05-352, 01/06/06, argued 04/18/06).

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15. Perez also asserted that he was improperly selected for prosecution merly because he contested the erroneous seizure of capital of a legitimate nascent business. ***See***, [A. 161-163]. Gary Anderson received complete immunity and Jessie Calloway admitted to possessing a gun while sharing drugs with others and he was not charged with § 924(c).

Here, the combined effect of the copious constitutional violations involved is a structural defect in several respects. Perez was denied the right to be heard on assets needed to retained counsel of choice that were seized illegally two (2) years before the criminal indictment.

He was not only groundlessly denied counsel of choice, but he was also without counsel during critical stages of the proceedings.[16] The consistent departure from precedent and Equal Protection Clause resulting from placing the cart before the horse, is also a structural error because it clearly infected the impartial function and subverted the integrity of the judicial review process. ***See***, ***Robertson v. Audi***, 56 F.3d 1259, 1266 (10th cir. 1995). "It is the duty of federal courts on habeaus review to 'sit to ensure that individuals are not imprisoned in violation of the Constitution." ***Herrera v. Collins***, 122 L.Ed.2d 203 (1993). "Justice must satisfy the appearance of justice." ***Offutt v. U.S.***, 348 U.S. 11, 14 (1954).

VII

The judgment departed from precedent that required it to engage the facts showing actual and legal innocence of the CCE conviction. ***See***, ***Kaufman v. U.S.***, 394 U.S. 217, 226-229 (1969). It ignored the fact that, absent the error of keeping motion of acquittal under advisement until post-trial hearings, the CCE count would not have reached the jury because the trial judge would have found Perez "not guilty" on this count. ***See***, [A. 151-154, 204, 222].[17] Due process required the Courts to render a full, fair and impartial adjudication of all the contentions raised.

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16. Perez was not only forced to assert his fundamental rights without the assistance of counsel, but the occasions where he was made to appear without counsel in the civil forfeiture case were also critical to the right to retain counsel of choice in the criminal case. Perez was also arraigned without counsel. ***See***, [Dkt. 90-cr-112]; ***White v. Maryland***, 373 U.S. 59, 60 (1963); ***U.S. v. Cronic***, 466 U.S. 648, 659-662 (1984); ***Bell v. Cone***, 535 U.S. 685 n.3 (2002), (arraignment is critical).

In Ex Parte Hawk, 321 U.S. 114, 118 (1944). ***Accord***, ***Gonzalez***, ***Steward***, and ***Winestock supra***. The meritorious aspect of this claim related to actual innocence when every government witness, except Gary Anderson and Anita, (whom since recanted her material testimony), testified that there was no conspiracy to sell cocaine. They only used cocaine that was shared with them on happenstance occasions. The defendants on trial all testified, in their own defense, to the same scenario. ***See***, [A. 26, n.7]. This is why the trial judge said: "I would not have convicted you on the continuing criminal enterprise." [A. 281-282].

It is "error for the Court to take under advisement a defendant's rule 29(a) motion." ***U.S. v. Chorman***, 910 F.2d 102, 10 & n.12 (4th cir. 1990), ("we need not decide whether evidence presented during the defense case may be considered in a case like this one'). It seems like the evidence that precludes finding the elements to sustain this conviction was ignored except upon reversing Ms. Jenkins' conviction. ***See***, [A. 33]. Perez would have not had to defend against the CCE nor would it allowed the jury to infer adversely from the defense evidence presented on this count.

The mandatory minimum 20 year sentence imposed on this count would also not apply absent this error. The judgment should, therefore, be open to address the meritorious nature of this claim of error to accomplish justice when the record clearly shows actual and legal innocence of the CCE conviction. ***Dye, Beggerly, Shlup*** and ***Klapprot,*** supra.

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17. This claim of error was not acknowledged on direct appeal. Also, a cross appeal was filed against the downward departure rendered, at sentencing, because the evidence was not "strong." J & C. A conflict was created when it did not reverse this departure upon affirming the CCE conviction on direct appeal

VIII

The judgment is void because it did not address whether or not the convictions improperly rest entirely on hearsay and alleged co-conspirators' statements. ***See***, [A. 172-173, 209-210 & 227-228]; ***Dye, Gonzalez, Steward, Beggerly*** and ***Schwartz***. Perez is therefore entitled to have this claim adjudicated on the merits with a judgment pointing to evidence, if any, that is separate and independent from the hearsay and alleged co-conspirators' statement. A conviction may not rest on such statements.***See***, Fed.R.Evid.801(d)(2)(E); ***Bourjaily v. U.S.***, 483 U.S. 171, 175 (1987); ***U.S. v. Blevins***, 960 F.2d 1252, 1255 (4th cir. 1992).

The merit of the underlying claim is evident from the record. For example, the direct appeal affirmed convictions because Gary Anderson "named other people" in the coke business with Augustine."[A.26]. However, Gary "named other people" via hearsay when he testified that: Perez "told" him he was paying the rent on Hamlett's apartment. [A.309]. Teresa Massie "told" him "that she was selling a little coke for Augie."[A.310, 316]. Audrey Colmore "told" him "at a nip joint that she sold cocaine for Augustine." [A.32,311, 315]. Perez told him that Calloway owed him $6,000. Perez also "told" him that he was going to give Stan $100,000. [A.312-313]. Jean Hubbard "confided in him" that she transported one kilo of cocaine from New York for Perez. [A. 30, 314].

Freeman testified that Perez "said" Stan owed him $300,000 for paying YDS payroll and, that he bought Stand a Mercedes Benz. [A. 317-321]. Hamlett testified that Gary "told" her that Perez stored drugs in her apartment. [A. 322-324]. Agent Brown testified that Jenkins told him that Perez told her that Stan Johnson asked for money to make payroll. [A.325-328]. Agent Terry testified that Massie told him that Perez told her that "Jean used to go to New York for him."

He also claimed that Massie told him that "Frances told Teresa that Frances had gone to New York for Augie." [A. 329]. Massie also told him that "Perez told her that he had to go over to AJ's...to check on Audrey because she was selling cocaine for him." [A. 330]. Calloway testified that "Augustine told him that he got his 'stuff' from Gorcio." [A. 30]. "Rush testified that Colmore, (whom she hardly knew), stopped her on the street after the indictment came down and said she hoped 'the government didn't know she had sold coke before." [A. 32].

Anita's affidavit also exposed how government official suborn to perjured testimony upon providing witnesses with information and then encouraged them to testify that one of the defendants on trial "told" them. ***See***, [A. 180 3, 220 n.3]. These alleged statements were not recorded as notes or on any written official reports. They were also denied by the defendants on trial when they testified in their own defense. Assuming these and other like statements were properly admitted, the convictions may not rest solely on such statements, ***Bourjaily supra*** .

Perez is therefore entitiled to an adjudication on whether or not his convictions rest solely on such statements with a judgment pointing to evidence that is separate and independent from the hearsay and alleged co-conspirators' statements. Moreover, no judgment has yet justified the admission of these unsubstantiated hearsay of alleged casual chatter that were clearly not made in furtherance of any conspiracy. Fed.R.Evid. 801(d)(2)(E) suppose to protect an accused against idle chatter, mis-reported and deliberately fabricated evidence. ***U.S. v. Perez***, 989 F.2d 574, 578 (10th cir. 1993). It protects against a co-defendant's desire to shift or spread blame, curry favor and avenge him or herself. ***U.S. v. Flores***, 985 F.2d 770, 776 (5th cir. 1994).

"Accomplices confession that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule." ***Lilly v. Virginia***, 527 U.S. 116, 134 (1999). Also, contrary to ***Gruneward v. U.S.***, 353 U.S. 391, 404 (1957) and; ***Anderson v. U.S.***, 417 U.S. 211, 218-19 (1974), even statements that were purportedly made after the conspiracy was over was admitted and relied on to affirm convictions. It will not be futile gesture to reopen the collateral judgment to address this claim to accomplish justice.

IX

The judgment refused to adjudicate the merits of some claims despite that the magistrate judge granted Perez's request to amend and supplement his § 2255 motion. ***See,*** [A. 229-231, 239]. This procedural defect erroneously "precluded a merit determination" on constitutional claims that relate back to the initial pleading. ***See Gonzalez*** and ***Winestock supra***. The subsequent appeal held that "the district court erred by denying certain of Perez's claim as untimely filed, since the statute of limitation was waived by the Government's failure to raise the defense.." [A. 235].

However, it did not reverse or remand the case back for adjudication on the merits. ***See, Rose*** and ***Clisby***, ***supra***. This defect also deprived Pereez due notice and a fair opportunity to respond to the contentions raised, sua sponte, by both the district court and the Court of Appeals. ***See, Day v. McDonough***, 164 L.Ed.2d 376, 388 & n.11 (2006); ***McMillan v. Jarvis***, 332 F.3d 244, 250 (4th cir. 2003). Perez also suffered significant prejudice by the delayed focus on the limitation issue by a judge he believed would not adjudicate his § 2255 motion, because of the consent rendered under 28 USC § 636(c). ***Day supra***. Perez is therefore entitled to have the following claims adjudicated by "the District Court without pre-certification by the Court of Appeals." ***Gonzalez*** at 496.

The supplemental claim involved: (1) a due process violation on the 21 year sentence imposed on the conspiracy and substantive counts, based on false information related to the recantation of the imaginary 16 kilograms of cocaine; (2) a double jeopardy violation under ***Rutledge v. U.S.***, 517 U.S. 292 (1996), that relate to the quest to vacate the CCE instead of the conspiracy because of the peripheral issues on the validity of the CCE conviction and (3); a due process violation on the lack of jurisdiction to try and sentence on substantive counts of possession with intent to distribute without a "mixture or substance containing a detectable amount of –cocaine" under 21 USC § 841(b). ***See,*** [A. 182-195].[18]

First, the right to be sentenced based on true and accurate information is a constitutional claim. ***See, Townsend v. Burke***, 334 U.S. 736 (1948); ***Zant v. Stephen***, 462 U.S. 862, 887 n.23 (1983); ***U.S. v. Caroll***, 3 F.3d 98, 101 n.7 (4th cir. 1993). This constitutional claim has been deemed a fundamental defect that is Cognizable under § 2255 proceedings. ***See, Shukwit v. U.S.***, 973 F.2d 903, 904 (11th cir. 1992); ***Poor Thunder v. U.S.***, 810 F.2d 817, 822 (8th cir. 1987). The illusionary 16 kilograms of cocaine had a substantial impact on the sentence imposed on the conspiracy and substantive counts. ***See***, [A. 183-185].

Second, a double jeopardy violation on convictions for both CCE and conspiracy is clearly a constitutional claim. ***See, Rutledge supra.*** This claim is "properly brought under § 2255 and § 2241." ***U.S. v. Little***, 392 F.3d 671, 676 (4th cir. 2004).

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18. The government "intelligently" agreed that Perez's jurisdictional claim is timely. ***See***, [A. 199]; ***Day*** at n.11. Also, the element of intent to distribute is clearly absent when the cocaine was obtained for personal use and was merely shared with others on happenstance occasions.

It has been deemed constitutional, cognizable and meritorious in a § 2255 case. ***U.S. v. Brown***, 155 F. 3d 431 (4th cir. 1998). ***See also***, ***U.S. v. Brown***, 202 F.3d 691 694 (4th cir. 2002), (vacated CCE upon applying ***Neder*** analysis to ***Richardson v. U.S.***, 526 U.S. 813 (1999), claim rendered double jeopardy challenge on CCE and Conspiracy convictions moot); [A. 183 n.1 & 231 n.7]. Finally, a jurisdictional defect may not be procedurally defaulted and therefore the Courts are required to examine the contention since a judgment so tainted must be vacated. ***U.S. v. Griffin***, 303 U.S. 226, 229 (1938).There is no statute of limitation against a jurisdictional defect. ***Insurance Corp. Of Ireland v. Compagnie Des Bauxities de Guinee***, 456 U.S. 699, 701 (1982); ***Bender v. Williamport School Dist***, 475 U.S. 534, 541 (1986).

The original purpose of the writ of habeas corpus was to allow relief where a defendant was convicted by a court that lacked jurisdiction. ***See, Johnson v. Zerbst***, 304 U.S. 458 (1938). Jurisdiction to try and sentence a defendant on substantive counts of possession with intent to distribute is clearly predicated on the seizure of a "mixture or substance containing a detectable amount of ---cocaine..." 21 USC § 841(b)(1)(A). ***See generally***, ***Chapman v. U.S.***, 114 L.Ed.2d 524, 535-36 (1991), (discusses history and Congressional intent of substantive counts under § 841(b). "Sentencing on § 841 counts proceeds on the quantity of drugs seized." ***U.S. v. Brinton***, 139 F.3d 718, 722 (9th cir. 1998). ***See also***, ***U.S. v. Coleman***, 166 F.3d 428, 432 (2d cir. 1999); ***U.S. v. Megerson***, 4 F.3d 337, 345 (5th cir. 1993); ***U.S. v. Bishop***, 894 F.2d 981, 986 (8th cir. 1990).

Therefore, pre-***Miller-EL*** assessment impeded a full and fair appellate review. It also resulted in the belatedly vague and erroneous conclusion that the supplemental issues are "non-constitutional claims [that] cannot be raised in a collateral attack and are patently meritless." [A. 235]. This

conclusory determination is not only inconsistent with due process but also, a blatant denial of Equal Protection Clause. ***See, Reed, Dye, Day*** and ***Schwartz, supra.***

X

The collateral review is also defective because the § 2255 presented over twenty (20) viable claims which the judgment conceded, either implicitly or explicitly, that an error was committed on each claim. Yet, it neglected to apply the cumulative error analysis to all the claims despite the specific request for this quantative analysis. ***See***, [A. 171-172]; ***Habeas Corpus & Cumulative Error***, 46 Baylor L.Rev. 59, 60 (1993). The impact of errors, when viewed in combination, may effectively infect the fairness of the trial. ***Lisenba v. California***, 314 U.S. 219 236 (1941).

It also claimed that "non of the incidents of partiality cited by Perez prejudiced him at trial." [A. 167-170 at 228].[19] However, a clear illustration that a judge was obviously bias throughout the proceedings is a "structural" error "subject to automatic reversal." ***Neder*** 144 L.Ed.2d at 46; ***Tumey v. Ohio***, 273 U.S. 510 (1927). Perez has a due process right to have this analysis applied to the series of constitutional violations presented in his § 2255 motion. ***Dye, Gonzalez, Steward,*** and ***American Canoe***, ***supra***. Here, the application of the correct analysis, under the cumulative error assessment, will certainly establish the denial of the right to a fair trial. See, e.g., U. S. V. Parker, 997 F.2d 219 (6th cir.1993),(held that four (4) errors, alone were harmless, but

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19. The justifiable reasons for moving, under 28 USC § 455, to disqualify the tiral judge from adjudicating Perez's § 2255 motion was obviously ineffective. ***See, Tripati v. Henman***, 843 F.2d 1160, 1163 (9th cir. 1988). The un-contested consent Perez gave, (under 28 ULSC § 636(c), which allows a magistrate to enter a final order), to avoid a bias judge also proved inadequate when the judge infringed upon Perez's discretionary right and ruled on his motion in spite of the foregoing efforts.

together they infected the fairness of the trial); ***U.S. v. Rivera***, 61 F.3d 131 (2d cir. 1995), (the combined effect of two (2) errors were found prejudicial enough to require a new trial); ***Harris by Ramsy v. Wood***, 64 F.3d 1432, 1438 (9th cir. 1995), (cumulative impact of counsel's errors prejudiced the petitioner). The groundless denial of this analysis should be corrected whenit can make a difference in obtaining relief.

SUMMARY

The preceding defects did not arise until one (1) year after the § 2255 motion was filed, which is when the judgment arrived. Thus, there is no meaningful difference between an erroneous procedural ruling that prevented review on a claim; the complete failure to address; and adjudicate the merits of a claim without justification for the evasion; errors of facts and law that obscured actual and legal innocence on a claim and; the application of an unconstitutional principle that prevented the correct judgment under the law.

These are all fundamental defects that corrupt the integrity of the underlying habeas review and, should be deemed proper under Rule 60(b). The obligation to be faithful and impartial in the application of the law is the primary agenda of our judicial system. The ultimate objective is a correct judgment and justice.

However, the lower Courts' denial of Perez's 60(b) motion did not acknowledge ***Dye, Gonzalez, Steward, Beggerly, Winestock, American Canoe,*** and ***Schwartz*** nor any other authority that would compel a significant assessment to accomplish justice. The judgments did not afford Perez an opportunity to delete any claim believed to be improper for 60(b) relief before treating it as a successive § 2255 motion.

Also, the 1998 judgment never received a meaningful review on appeal because it was then when requests for COA were denied improperly. It simply "dismissed the appeal on the reasoning of the district court." [A. 235]. That appeal was dismissed with reference to "reasoning" that do not actually exist in the district court's judgment wherein facts, laws and whole claims were completely ignored.

Accordingly, the denial of Rule 60(b)(b) relief has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It should make the courts below adhere to precedent from this Court, its own court and other Courts of Appeals.

CONCLUSION

WHEREFORE, the petitioner hereby prays this Honorable Court grant certiorari and vacate and remand this case in light ***of Day, Dye, Gonzalez, Miller-EL, Steward, Reed*** and ***Kllapprott supra***, based on all the foregoing reasons and, more importantly, in the interest of justice.

Respectfully Submitted,

Petitioner, Augustine Perez
PRO-SE

DATED: SEPTEMBER 12, 2006

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APPENDIX A-1

AUGUSTINE PEREZ	)	
Petitioner,	)	**Civil Action No. 7:05cv00488**
	)	
	)	
v.	)	**MEMORANDUM OPINION**
	)	**& FINAL ORDER**
	)	
UNITED STATES OF AMERICA,	)	**By: James C. Turk**
	)	**Senior United States District**
Respondent.	)	**Judge**

Petitioner, Augustine Perez, a federal inmate proceeding pro se, has submitted to the court what this court will construe as a motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255.

Petitioner argues that his petition shuld be vonsidered under Rule 60(b). Rule 60(b) permits the court to relieve a party from final judgment, order, or proceeding for reasons of mistake, inadvertence, suprise, or excusable neglect. Fed.R.Civ.P.60(b). Such relief is an extraordinary remedy and should only be invoked on a showing of exceptional circumstances. Dowell v. State Farm Fire and Cas. Auto Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993). Additionally, "inadvertence, ignorance of the rules, or mistakes construing the rules" and delays caused by the postal service do not usually constitue 'excusable' neglect. Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 533-34 (4th Cir. 1996)(quoting Pioneer Invest. Servs. Co. V. Brunswick Assocs. Ltd., 507 U.S. 380, 395 (1993).

Perez has failed to suggest any circumstances which warrant relief. Perez has not alleged any of the factors listed in Rule 60(b) which would support granting relief, rather, Perez attempts to argue that this court misapplied the law in dismissing the matter. Whatever the purpose of Rule 60(b) may be, it is not to rehash those issues which nave alredy been addressed inan earlier ruling. CNF Constructors, Inc. V. Dohohoe Construction Co., 57 F.3d395,401 (4th Cir. 1995). Therefore, in this instance relief under Rule 60(b) is not appropriate.

As the court finds that Perez is not entitled to relief under Rule 60(b), the court will construe his petition as a § 2255 motion. However, court records indicate that petitioner has previously filed a § 2255 motion, Civil Action No. 7:97cv00179, regrding the same conviction and/or sentence. Thus, petitioner's current § 2255 motion is a second or subsequent one, falling under the provisions of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Under these amendments, this court may consider a second or successive § 2255 motion only upon specific certification from the United States Court of Appeals for the Fourth Circuit that the claims in the motion meet certain criteria. See § 2255, ¶8. As petitioner has not submitted any evidence of having obtained certification from the Court of Appelas to file a second or successive § 2255 motion, it is hereby

ORDERED

and the above referenced motion to vacate, set aside or correct sentence, pursuant to 28 U.S.C. § 2255, shall be and hereby is **FILED** for administrative purposes only and **DISMISSED** without prejudice as successive.

Petitioner is hereby advised of the procedure for obtaining certification from the United States Court of Appeals for the Fourth Circuite to have this court review a successive § 2255 motion. Petitioner must submit a copy of successive § 2255 motion to the Court of Appeals, along with a motion requesting a three-judge panel certification that the district court may review the successive § 2255 motion. See 28 U.S.C. § 2244 (as amended, 1996). A Fourth Circuit form and instructions for filing this motion will be included with this notice or are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St., Richmond, VA 23219.

The Clerk is directed to send certified copies of this order to petioner and to strike the case fromt eh active docket of the court.

ENTER: This 15th day of August, 2005.

_____

Senior United States District Judge

JUDGMENT

FILE: February 22, 2006

UNITEDE STATES COURT OF APPEALS
for the
Fourth Circuit

No. 05-7529
CR-90-112
CA-05-488-7

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

AUGUSTINE PEREZ

Defendant - Appellant

Appeal from the United States District Court for the Western District of Virginia at Roanoke

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the apeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect uon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-7529

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AUGUSTINE PEREZ,

Defendant - Appellant,

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turke, Senior District Judge. (CR-90-112;CA-05-488-7)

Submitted: February 6, 2006 Decided: February , 2006

Before MICHAEL and DUNCAN, Circuite Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Augustine Perez, Appellant Pro Se, ray B. Fitzgerald, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 6, 2006

No. 05-7529
CR-90-112
CA-05-488-7

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

AUGUSTINE PEREZ
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Michael, Judge Duncan, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor

CLERK